Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

STATE OF UTAH, *et al.*,

Petitioners,

v.

DONALD L. EVANS, *et al.*,

Respondents.

On Appeal from the United States District Court for the District of Utah

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the court below erred in ruling that the Census Bureau, if it chooses to use the authority granted in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), to include in the apportionment count overseas federal employees who have retained ties to their home States, may nevertheless, consistent with the Census Act and the Constitution's Census Clause, automatically exclude other identifiable Americans living abroad who have retained similar ties to their home States, on the grounds that overseas federal employees (a) constitute a reasonably representative sample of all Americans living abroad, (b) are generally easier to identify than most other Americans living abroad, or (c) are entitled to special recognition in the apportionment count for the "involuntariness of their overseas posting, at the behest of their government."

2. Whether the court below erred in ruling that an action by the federal government that has an obvious *tendency* to deter particular religious conduct – in this case overseas missionary service during the taking of the census – nevertheless does not impose a "substantial burden on religion" within the meaning of the Religious Freedom Restoration Act, and otherwise does not violate that Act or the First Amendment's Free Exercise Clause, merely because the plaintiffs cannot establish that they were *personally* deterred from engaging in that religious conduct.

PARTIES TO THE PROCEEDING

The appellants herein, who were plaintiffs before the three-judge district court, are the State of Utah; Michael O. Leavitt, Governor; Olene S. Walker, Lieutenant Governor; Mark L. Shurtleff, Attorney General; L. Alma Mansell, President, Utah Senate; Martin R. Stephens, Speaker, Utah House of Representatives; Mike Dmitrich, Minority Leader, Utah Senate; Ralph Becker, Minority Leader, Utah House of Representatives; U.S. Senators Orrin G. Hatch and Robert F. Bennett; U.S. Representatives James V. Hansen, Christopher B. Cannon, and James Matheson; and Utah residents Blake J. Russon, Michael Wayne Anderson, Brent McGhie, and Jean McGhie, all four of whom were serving overseas missions for the Church of Jesus Christ of Latter-day Saints on April 1, 2000.

The appellees in this Court, who were the principal defendants below, are Donald L. Evans, Secretary of the United States Department of Commerce; and William G. Barron, Acting Director of the United States Census Bureau.

Additional appellees, who appeared as defendant-intervenors below, include the State of North Carolina; Michael F. Easley, Governor; Beverly Perdue, Lieutenant Governor; Roy Cooper, Attorney General; Marc Basnight, President Pro Tempore, North Carolina Senate; James Black, Speaker, North Carolina House of Representatives; Patrick Ballentine, Minority Leader, North Carolina Senate; Leo Daughtry, Minority Leader, North Carolina House of Representatives; U.S. Senators Jesse Helms and John Edwards; and U.S. Representatives Eva M. Clayton, Bob Etheridge, Walter B. Jones, David Price, Richard Burr, J. Howard Coble, Mike McIntyre, Robin Hayes, Sue Myrick, T. Cass Ballenger, Charles H. Taylor, and Melvin L. Watt.

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OPINION BELOW

The opinion of the three-judge district court (App. 1a-22a) is reported *sub nom. Utah* v. *Evans* at 143 F. Supp. 2d 1290 (D. Utah 2001).

JURISDICTION

The judgment of the three-judge district court was entered on April 17, 2001. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1253 and 2101(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section II, Clause 3 of the United States Constitution is reproduced at App. 23a.

2. Amendment I of the United States Constitution is reproduced at App. 23a.

3. Sections 1 and 2 of Amendment XIV of the United States Constitution are reproduced at App. 23a-24a.

4. Sections 141(a) and 195 of Title 13, United States Code, are reproduced at App. 25a.

5. Sections 2000bb-1 through 2000bb-3 of Title 42, United States Code, are reproduced at App. 25a-27a.

STATEMENT OF THE CASE

In this lawsuit, the State of Utah, many of its elected officials, and four Utah residents who were serving as overseas missionaries for the Church of Jesus Christ of Latter-day Saints ("LDS Church") on April 1, 2000 (collectively, "Utah") challenge the discriminatory treatment of the population of Americans temporarily residing abroad in the 2000 census. Specifically, in the 2000 census the Secretary of Commerce and the Director of the Census Bureau (collectively "the Bureau") included only federal

employees in the overseas "population" enumerated for purposes of congressional apportionment, and excluded from that enumeration other citizens who were temporarily absent under similar circumstances.

In upholding that result, the three-judge district court relied heavily on this Court's decision in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), which upheld the Bureau's decision to include overseas federal employees but left open the question of how to treat other Americans living abroad. Based on its reading of that decision, the district court unjustifiably assumed that overseas federal employees are entitled to preferential treatment because they allegedly constitute a reasonably representative sample of all Americans living abroad, are generally easier to identify than most other Americans living abroad, and are somehow entitled to special recognition in the apportionment count for the "involuntariness of their overseas posting, at the behest of their government." App. 17a. The district court also held that the Bureau's policy, although it obviously dilutes the relative voting power of individuals serving as religious missionaries abroad (and may therefore deter missionary activity during future decennial censuses), nevertheless does not impose a "substantial burden" on religion because the plaintiffs here were unable to show that this policy – which was not widely known prior to this case – actually deterred them from serving as missionaries during the census period.[1]

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[1] The same parties are currently involved in a separate action in the three-judge court for the District of Utah arising out of the Census Bureau's enumeration of the domestic population. *Utah* v. *Evans*, No. 2:01-CV-292G (D. Utah filed Apr. 25, 2001). In that action, Utah has challenged the Bureau's decision to supplement the domestic count by means of a statistical sampling technique known as "hot-deck imputation." The Bureau's use of hot-deck imputation had the same affect on apportionment as the partial count of the overseas population. That is, if the Bureau had limited its apportionment count to those persons *actually enumerated* (*i.e.*, by the mail-in questionnaire or by a contact by a census enumerator), and had not supplemented that count by adding persons who

1. As this Court is well aware, the census is conducted pursuant to Article I, Section 2, Clause 3 of the United States Constitution. As modified by the Fourteenth Amendment, the so-called "Census Clause" requires Congress to conduct an "actual Enumeration" of "the whole number of persons in each State" every ten years, and to use that enumeration as the basis for apportioning seats in the House of Representatives. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. Through the Census Act, 13 U.S.C. § 1 *et seq.*, Congress has delegated responsibility for conducting the census to the Secretary of Commerce, who is directed to conduct "a decennial census" of the "population" of each State on "the first day of April of [each] such year." 13 U.S.C. § 141(a).

To enumerate each State's "population" in the decennial census, the Bureau establishes rules to determine who should be counted, and to which State each person should be allocated for purposes of congressional apportionment. The latter rules historically have directed the Bureau to determine each individual's place of "usual residence," *i.e.*, the State in which each person normally resides despite occasional absences.

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were never actually counted but only "imputed" by application of a statistical sampling technique, Utah would have been entitled to a fourth representative in the U.S. House of Representatives, North Carolina would not have received its 13th representative in the House, and no other State's apportionment would have been affected. Utah's Complaint in the imputation case challenges the use of hot-deck imputation as a method of "sampling" prohibited by the Census Act, 13 U.S.C. § 195; *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 344 (1999) (holding that "the Census Act prohibits the . . . use[] of statistical sampling in calculating the population for purposes of apportionment"), and as a method of estimation inconsistent with the Constitutional requirement of an "actual Enumeration," U.S. Const. art. I, § 2, cl. 3. The imputation case is set for oral argument in the three-judge court on the parties' cross-motions for summary judgment on August 29, 2001. Because a favorable decision in that case may give Utah the relief it seeks here, it has not yet sought expedited briefing in this case.

In the first Census Act, Congress adopted a broad "usual residence" rule, such that "every person occasionally absent at the time of the enumeration [was counted] as belonging to that place in which he usually resides in the United States." Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 101, 103. As this Court recognized in *Franklin* v. *Massachusetts*, 505 U.S. 788, 804 (1992), this Act "placed no limit on the duration of the absence." *Id.* at 804. Moreover, "[i]n the related context of congressional residence, James Madison interpreted the constitutional term 'inhabitant' to include 'persons absent occasionally for a considerable time on public or private business.'" *Id.* at 805 (citation omitted) (quoting 2 *Records of the Federal Convention of 1787*, at 217 (Max Farrand ed., rev. ed. 1966).

Under the Bureau's current policies, by contrast, "usual residence" is defined as the place where a particular individual presently lives and sleeps most of the time. Thus, under the rules governing recent censuses, U.S. citizens residing in foreign countries generally have not been deemed part of the "population" of any State, and therefore have been excluded from the apportionment count – even if they intended to return to their respective home States within a specified period.

2. As this court also recognized in *Franklin*, the Bureau implemented a narrow exception to those rules in the 1970 and 1990 censuses, and the Bureau applied the same exception again in the 2000 census. That exception applies only to persons employed by the federal government while residing overseas; it authorizes the Census Bureau to count such persons and to apportion them to their respective home States by reference to administrative records maintained by various federal agencies.

The Bureau's practice of counting overseas federal employees has affected congressional apportionment on at least one previous occasion: it caused one seat to shift from Massachusetts to Washington following the 1990 census.

Massachusetts filed a lawsuit challenging that practice, arguing, among other things, that the inclusion of *any* citizens residing overseas violates the Census Clause because such citizens' "usual residence" is, by definition, outside the United States. *Franklin*, 505 U.S. at 803.

This Court rejected that argument. First, the Court explained that, from its inception, the Census Bureau has made apportionment decisions according to each individual's "[u]sual residence," a semantic touchstone that "can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place." *Id.* at 804. The Court noted that the Bureau had determined that "many federal employees temporarily stationed abroad had retained their ties to the States" and "consider themselves to be usual residents of the United States." *Id.* at 806 (internal citations and quotation marks omitted). In addition, the Court pointed to James Madison's interpretation of the term "inhabitant" in the constitutional provisions governing congressional residence qualifications, U.S. Const. art. I, § 2, cl. 3, which included "'persons absent occasionally for a considerable time on public *or private* business.'" *Franklin*, 505 U.S. at 805 (quoting 2 *Records of the Federal Convention of 1787*, at 217 (Max Farrand ed., rev. ed. 1966).

Accordingly, the Court upheld the Bureau's decision to include federal employees stationed overseas in the apportionment count, finding that counting such federal employees "does not hamper the underlying constitutional goal of equal representation" and in fact "promotes equality." *Id.* at 806. Indeed, the Court explained that a decision to exclude such persons from the census could implicate the Census Clause by preventing "the votes of all those who reside in [a particular] State" from being "weighted equally to votes of those who reside in other States." *Id.*

The Court, however, did not address the issue of how to treat other Americans living abroad who might retain equal or

even stronger ties to their home States than overseas federal employees. Moreover, although the Court ultimately upheld the Bureau's decision to count the latter group, the Court expressly acknowledged that a constitutional violation might be made out on a different factual showing. For example, the Court concluded that Massachusetts had failed to demonstrate that its proposed remedy – "eliminating overseas employees entirely from the state counts" – would "make representation in Congress more equal." *Id.* at 806.[2]

3. On December 28, 2000, the Bureau announced that the partial enumeration of the overseas population had resulted in North Carolina's gaining an additional seat – its thirteenth – in the House of Representatives. That seat would have been Utah's fourth if an additional 857 individuals had been included in its apportionment population. See Amended Statement of Undisputed Facts ("ASUF") ¶ 29, at 19, *attached to* Plaintiffs' Reply Memorandum in Support of Summary Judgment, *Utah* v. *Evans*, No. F-2-01-CV-23 B (D. Utah Mar. 5, 2001) ("Utah Reply"). As the plaintiffs established through evidence submitted to the district court, Utah would have been entitled to a fourth Representative

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[2] The Court has articulated and applied this "equal representation" approach in other recent decisions, most notably *Wisconsin* v. *City of New York*, 517 U.S. 1 (1996). In *Wisconsin*, the Court rejected a challenge to the Bureau's decision not to use the "post-enumeration survey" ("PES") – a statistical adjustment technique designed to correct the so-called "undercount" in the census. *Id.* at 19-20. The Court approved the Bureau's decision on the ground that "a preference for" enumeration methods that are likely to improve "distributive accuracy" (*i.e.*, a condition in which the census accurately reflects the respective populations of the 50 States in their proper proportions) over competing methods that may result in greater "numerical accuracy" (*i.e.*, a condition in which the census accurately reflects the total population of the country) "would seem to follow from the constitutional purpose of the census." *Id.* at 20. The Court then cited with approval the Bureau's conclusion that "unadjusted census data would be considered the most distributively accurate." *Id.*

following the 2000 census if the Bureau had (a) limited the apportionment count to the domestic resident population, (b) included LDS missionaries who had retained their ties to their home States and could be enumerated by reference to reliable administrative records, or (c) conducted an enumeration of all Americans residing temporarily abroad. See ASUF ¶ 38, at 21; see also *id.* ¶¶ 36-37, at 20-21, ¶¶ 39-51, at 21-25. Thus, the Bureau's partial enumeration of the overseas population diminished Utah's representation by 25% in the House of Representatives, and by nearly 17% in the Electoral College, as compared with any of these three alternatives.

Utah filed this lawsuit on January 10, 2001, alleging that this partial enumeration was unlawful under the Census Clause, the Census Act, the Free Exercise Clause, and RFRA. Utah also sought declaratory and injunctive relief directing the Bureau to treat overseas federal employees no differently than other similarly situated Americans residing abroad, including individuals who were temporarily serving overseas as missionaries for the Utah-based LDS Church, and whose inclusion would have entitled Utah to a fourth Representative. See ASUF ¶ 38, at 21.[3]

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[3] The district court incorrectly suggested that Utah was somehow barred under the prayer for relief in its Complaint from seeking a remedy requiring the Bureau to count any overseas Americans other than federal employees and LDS missionaries. App. 11a. First, as Federal Rule of Civil Procedure 54(c) expressly provides, "[e]xcept as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."

Second, the district court was simply mistaken in concluding that Utah conceded that its Complaint lacked a prayer for such relief. At oral argument, counsel for Utah pointed out that the Complaint expressly requests a declaratory judgment that the Bureau's "disparate treatment of similarly situated citizens" is unlawful and also asks for "such further relief as this Court deems just and proper." *See* Second Am. Compl. at 18-19, *Utah* v. *Evans*, No. F-2-01-CV-23:B (D. Utah Jan. 30, 2001); *see also* Summ. J. Oral Argument Tr. at 26 (describing the scope of the relief

Although the Secretary of Commerce and the Director of the Census Bureau were the principal defendants named in Utah's complaint, they were later joined by the State of North Carolina and several of its officers and representatives, who intervened as defendants soon after the case was filed. Utah moved for summary judgment on all of its claims on January 30, 2001. Both sets of defendants subsequently moved to dismiss and cross-moved for summary judgment.

4. In summary judgment memoranda submitted to the district court, Utah repeatedly pointed out that its lawsuit presented the question that this Court had left unaddressed in *Franklin*, namely, how to treat overseas Americans who are not federal employees, but who retain similarly strong ties to their home States. Utah, moreover, raised four principal arguments in support of its claim that the Bureau's decision to count federal employees while excluding LDS missionaries violated the Census Clause and the Census Act.

First, Utah pointed out that the Bureau had made no attempt to comply with its statutory and constitutional duty to conduct an "actual Enumeration," U.S. Const. art. I, § 2, cl. 3, of the "the whole number of persons," *id.* amend. XIV, § 2, in the relevant "population as of [April 1, 2000]," 13 U.S.C. § 141(a). Instead, the Bureau had counted only a small *subset* of the overseas population -- one comprised exclusively of persons employed by the federal government -- thereby

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sought in Utah's complaint, and making specific reference to the plaintiffs' broad request for declaratory relief). As plaintiffs made clear in their briefs, this remedy would leave the Bureau free to count, not just LDS missionaries, but other groups of overseas Americans who are also situated similarly to overseas federal employees. *See* Utah Reply at 53 ("Plaintiffs seek a remedy that would preserve substantial discretion for the Secretary and the Census Bureau, and permit them to pursue any course that would treat LDS missionaries (and other groups who can show that they are similarly situated) in the same way that the 2000 census treats overseas federal employees").

disregarding the plain text of the governing statutory and constitutional provisions.

Second, Utah demonstrated that the Bureau's partial enumeration of the overseas population undermines the constitutional principles of "equal representation" and "distributive accuracy" set forth in *Franklin* and *Wisconsin* v *City of New York*, 517 U.S. 1, 20 (1996). Specifically, Utah pointed out that, to the extent an enumeration of overseas federal employees is legally justifiable, the same justification necessarily calls for a corresponding enumeration of *all* Americans residing temporarily overseas who are similarly situated, *i.e.*, those who "consider themselves to be usual residents of the United States," have "retained their ties to their home States," 505 U.S. at 806, and can be allocated to their respective States by reference to existing administrative records. See *id.*

Third, in response to arguments advanced by the defendants, Utah explained that, to the extent one might object to the inclusion of LDS missionaries because they comprise a small segment of the total overseas population, and their distribution among the States does not necessarily mirror that of the domestic resident population, the same objection would apply with equal force to overseas federal employees. See Utah Reply at 42-45. Thus, if LDS missionaries must, as the defendants argued,[4] be excluded from the apportionment count, so too must overseas federal employees, since a decision to enumerate only the latter does not bear the requisite "reasonable relationship to the accomplishment of an actual enumeration of the population,

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[4] *See* Federal Defs.' Mem. in Opposition to Summ. J. at 28, *Utah* v. *Evans*, No. F-2-01-CV-23.B (D. Utah Feb. 22, 2001) (arguing that a decision to "add to stateside population counts only one small segment . . . of a larger population universe (all private Americans living abroad)" would "bias[] the results" in favor of certain States and thus would "clearly violate[] the principles of distributive accuracy enshrined in *Wisconsin*.").

keeping in mind the constitutional purpose of the census." *Wisconsin*, 517 U.S. at 20.

Fourth, in response to the Bureau's assertion that overseas federal employees constitute a reasonably representative sample of the total overseas population,[5] Utah showed that a decision to enumerate them on that basis cannot be reconciled with the Census Act, 13 U.S.C. § 195, which categorically prohibits the use of statistical sampling in the apportionment count. See *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316 (1999) (interpreting 13 U.S.C. § 195 to prohibit the use of statistical sampling in the apportionment count).

With respect to its religious liberty claims, Utah pointed out that, in every respect relevant to the decennial census, LDS missionaries serving overseas are similarly situated to overseas federal employees, and are distinguishable only in that the former leave the country in furtherance of their religious beliefs, while the latter do so in furtherance of an employment arrangement with the federal government. Thus, Utah showed that the Bureau's decision to enumerate only the latter imposes a substantial burden on the free exercise of religion (since individuals derive a cognizable benefit from being counted in the decennial census), and otherwise runs afoul of the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment.

5. The three-judge district court heard oral argument on all dispositive motions on March 27, 2001. In a memorandum opinion dated April 17, 2001, the court granted summary judgment for the defendants and dismissed each claim raised by Utah.

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[5] *See* DOJ Mem. at 31-32 n.12 (asserting that "federal employees are distributed among the states in proportions approximately equal to the distribution amongst the states nationwide.").

In so doing, the district court reasoned that the Bureau's preferential treatment of overseas federal employees is justified by the fact that such persons are distinguishable from all other Americans residing abroad in each of the three respects identified by the defendants: (a) overseas federal employees constitute a reasonably representative sample of the entire overseas population, see App. 17a ("the distribution of federal overseas employees among the fifty states . . . does not present any extreme variations among the states"); see also DOJ Mem. at 31-32 n.12; (b) they are generally easier to identify than most other Americans living overseas, see App. 18a ("federal overseas employees are uniquely susceptible to being accurately counted because the Census Bureau has access to data about those individuals which is different both in quality and quantity from the data available about other Americans overseas"); and (c) they are entitled to special consideration in the apportionment count because of the "involuntariness of their overseas posting, at the behest of their government," *id.* at 17a.

In so holding, the district court relied heavily on this Court's *Franklin* decision. Although the district court recognized that the Court in that case had no occasion to rule on the proper treatment of overseas Americans other than federal employees, the district court nevertheless reasoned that, because the *Franklin* Court presumably "knew that federal employees were not the only group of Americans abroad," App. 16a, the Court's *silence* regarding the Bureau's decision to exclude all other Americans living abroad makes that decision judicially unassailable. See *id.*

Perhaps because of its broad reading of *Franklin*, the district court simply side-stepped many of Utah's arguments under the Census Clause and the Census Act. For example, the district court failed to address Utah's textual argument that overseas federal employees cannot be deemed to constitute the "whole number of persons" in the relevant "population" of Americans living overseas under the

Constitution and the Census Act, but instead are at most an isolated subset of that population.[6] The district court also failed to come to grips with Utah's argument that LDS missionaries – who maintain close ties to their home States during their temporary absence overseas, and can easily be identified, enumerated, and allocated to their respective States by reference to administrative records – are constitutionally indistinguishable from overseas federal employees insofar as the decennial census is concerned. The court's only response to this argument was the blithe suggestion that LDS missionaries constitute an arbitrary segment of the overseas population whose State-by-State distribution does not mirror that of the domestic resident population. See App. 18a. At the same time, however, the district court never fully addressed the fact that this argument applies with equal force to overseas federal employees.[7] Similarly, the district court failed even to acknowledge Utah's argument that, to the extent defendants are correct in suggesting that the federal employee segment of the overseas population can be considered a "representative sample" of the full overseas population, the Bureau's partial count is unlawful under the Census Act, 13 U.S.C. § 195, as an impermissible attempt to introduce sampling into the apportionment count. See *House of Representatives*, 525 U.S. at 343 (concluding that 13

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[6] The Bureau, moreover, has never explained how its decision to exclude some overseas Americans while including others is consistent with these specific statutory and constitutional commands.

[7] To be sure, the district court noted that the State-by-State distribution of overseas federal employees "does not present any extreme variations among the states." App. 17a. Nevertheless, it never made any attempt to explain why the bias resulting from the inclusion of one segment of the population must be "extreme" to justify excluding that group from the census. Nor did it explain why, under the governing authorities, any identifiable group residing overseas can lawfully be excluded from the census merely because that group's distribution is different from, or more "extreme" than, the distribution of other enumerated components of the same population.

U.S.C. § 195 prohibits the use of sampling in the apportionment count).

In addressing the missionary plaintiffs' claims under the Free Exercise Clause and RFRA, the district court acknowledged that "missionary work is one of the most basic and important obligations of the LDS faith," App. 10a (internal quotation marks omitted). Without disputing the fact that LDS missionaries serving overseas were excluded from the 2000 census as a direct result of their decision to act in conformity with their religious beliefs, the panel concluded that the plaintiffs had failed to establish that the Bureau's actions imposed any burden on the free exercise of religion. See *id.* at 10a-11a.

This conclusion was based entirely on the absence of evidence showing that any of the missionary plaintiffs "was even aware of the upcoming Census when [they] decided to serve" missions, or that any of them knew that the Bureau's "failure to enumerate [missionaries residing overseas] would have any effect at all on the apportionment of House of Representative seats to Utah." App. 10a. Having concluded that the Bureau's actions did not impose a substantial burden on the free exercise of religion, the panel declined to consider whether any such burden could be justified under RFRA or the First Amendment.

Utah filed a timely notice of appeal on June 15, 2001. See App. 21a-22a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court has consistently granted plenary review of decisions of three-judge courts involving the legality of the methodologies employed by the Census Bureau in conducting the apportionment count. See *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 445 (1992) (explaining that the Court had noted probable jurisdiction in a case challenging the constitutionality of the "method of equal

proportions" used to apportion representatives in Congress in light of "the importance of the issue and its significance in this year's congressional and presidential elections"); *Franklin* v. *Massachusetts*, 503 U.S. 788, 791 (1992) (explaining that the Court had noted probable jurisdiction and ordered expedited briefing in a case challenging the Census Bureau's decision to allocate federal employees living abroad to their "home of record" for apportionment purposes); *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 328 (1999) (explaining that the Court had noted probable jurisdiction in a case challenging the Bureau's proposed use of statistical sampling in the 2000 census). The questions presented here are of similar legal and practical significance, and surely are sufficiently substantial to warrant this Court's plenary consideration.

As a practical matter, the Bureau's policy and the decision below mean that Utah's representation in the House of Representatives has been improperly diluted by 25%, and its representation in the Electoral College diluted by roughly 17%. Thus, if the decision below stands, Utah and its approximately 2 million residents will be seriously under-represented in both of these bodies for the next decade.

Even more important, the opinion below resolves significant legal issues left open by this Court's earlier decision in *Franklin*. Without this Court's plenary consideration, the lower court's convoluted resolution of these issues will become the law of the land governing future congressional apportionment disputes.

As a result of that decision, for example, and as explained in Section I below, the Bureau is now authorized to treat overseas federal employees as a representative "sample" of all Americans living abroad, despite this Court's clear holding in *House of Representatives* that the Census Act bars the use of all statistical sampling techniques in the apportionment of Representatives. The lower court decision also purports,

under the authority of *Franklin*, to authorize the Bureau to discriminate among groups of Americans based on such arbitrary and non-textual factors as the relative "contributions" that those groups are making to their country. These applications of the Census Act and the Census Clause are simply too important – and too erroneous – for this Court to ignore.

As discussed in Section II, another troubling feature of the decision below is its extraordinarily crabbed interpretation of the "substantial burden" requirement of both the Religious Freedom Restoration Act and of this Court's free exercise decisions. Under the lower court's decision, federal agencies are now free to take any action that has a clear tendency to *discourage* religious exercise, as long as there is no plaintiff who can show that the discouragement was so strong, and his commitment to his religious belief so weak, that he actually *failed* to live up to that belief as a result of the agency's action. Such an approach would virtually destroy the protections for religious freedom enshrined in both the Constitution and RFRA, and therefore merits this Court's plenary consideration.

I. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS REGARDING THE PROPER APPLICATION OF THE CENSUS ACT AND THE CONSTITUTION'S CENSUS CLAUSE THAT WERE NOT RESOLVED IN *FRANKLIN* AND *HOUSE OF REPRESENTATIVES*.

In the last decade, this Court has reviewed four separate challenges to census-related rules under the Census Clause and the Census Act. See *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316 (1999); *Wisconsin* v. *City of New York*, 517 U.S. 1 (1996); *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992); *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442 (1992). Although the Court has accorded a degree of deference to the federal government's decisions in this area, it has also rejected the

notion that census decisions are purely "political questions" outside the purview of proper judicial review. *Montana*, 503 U.S. at 456-59. In so doing, the Court has recognized constitutional and statutory standards that constrain governmental discretion in conducting the census.

In light of those standards, the lower court's analysis of Utah's claims is analytically deficient in at least four crucial respects. Those deficiencies arise out of the district court's failed attempt to distinguish overseas federal employees from LDS missionaries and other segments of the overseas population, as well as a basic misunderstanding of this Court's opinion in *Franklin*. Each of those errors, moreover, provides the Bureau with authority to manipulate the census in ways that are contrary to the Census Act, the Census Clause, and this Court's prior decisions.

1. First, in upholding the Bureau's decision to enumerate only a subset of the total overseas population, the district court reasoned in essence that overseas federal employees constitute a statistically representative sample of the entire overseas population. See App. 17a-18a. Specifically, the district court suggested that the Bureau's enumeration of this group, and the simultaneous exclusion of other similarly situated groups, including LDS missionaries, can be justified on the ground that "the distribution of federal overseas employees among the fifty states . . . does not present any extreme variations among the states." *Id.* at 17a.[8] "Thus," the district court concluded, "we do not have a situation where one state, or a group of states, is greatly advantaged or disadvantaged, compared to the remaining states, by the inclusion of its federal overseas employees." *Id.* at 18a.

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[8] The Bureau similarly argued that overseas federal employees are distinguishable from LDS missionaries because they "are distributed among the states in proportions approximately equal to the distribution of the population amongst the states nationwide." *See* DOJ Mem. at 31 n.12.

In making this assertion, however, the district court exposed a fatal weakness in its own reasoning as well as that advanced by the Bureau. To the extent the district court and the Bureau are correct in suggesting that overseas federal employees constitute a representative sample of the total overseas population, any decision to enumerate them on that basis runs afoul of the Census Act, 13 U.S.C. § 195, which expressly prohibits the use of statistical sampling in the apportionment count. See *House of Representatives*, 525 U.S. at 343.

Moreover, as four members of this Court observed in *House of Representatives*, the Census Clause's requirement that congressional apportionment be based on an "actual Enumeration" independently prohibits the use of sampling, or any other method of estimation, in the decennial census. See *id.* at 346-47 (Scalia, J., concurring, joined by Rehnquist, C.J., Kennedy, J., and Thomas, J.). That observation finds support in the fact that the Constitution prescribes "permanent & precise standard[s]" to govern the reapportionment of political power among the States in order to protect against political intransigence and manipulation. 1 *Records of the Federal Convention of 1787*, at 578 (Max Farrand ed., rev. ed. 1966). For example, the Framers eschewed the notion of statistical sampling techniques in favor of the requirement of an "actual enumeration" to avoid giving "the party controlling Congress the power to distort representation in its own favor" by selecting "among various estimation techniques having credible (or even incredible) 'expert' support." *House of Representatives*, 525 U.S. at 348 (Scalia, J., concurring); see also *id.* at 343 (opinion of the Court by O'Connor, J.) (holding that the Census Act prohibits statistical sampling in calculating the apportionment population and declining to address the question whether the Constitution itself precludes such sampling). Actual enumeration, in other words, "may not be the most accurate way of determining population, but it may be the most accurate way of determining population with

minimal possibility of partisan manipulation." *Id.* at 348-49 (Scalia, J., concurring).

If the power to choose among "various estimation techniques" introduces an unacceptable "possibility of partisan manipulation," surely the discretion to count arbitrary subsets of the whole population is even more troubling. Indeed, if the Bureau may isolate the federal employee segment of the overseas population on the ground that it deems it politically or patriotically appropriate to do so, then other more blatantly partisan decisions to enumerate different segments of the population may logically follow.

By the same token, the district court's opinion disregards the fact that the Bureau's partial enumeration of the overseas population cannot be reconciled with the plain language of the Constitution and the Census Act. Instead of conducting an "actual Enumeration" of the "whole number of persons" in the relevant overseas "population," as required under the Constitution (U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2) and the Census Act (13 U.S.C. § 141(a)), the Bureau attempted to estimate an arbitrary subset of that population. Indeed, of all Americans residing abroad, including employees working in the private sector, missionaries performing religious service, volunteers providing charitable work, and countless others, only those employed by the federal government were counted as a relevant part of the "population."

The court below acknowledged that the Bureau had made no attempt to enumerate the "whole number of persons" that constitute the overseas "population." See App. 12a. Yet the court, like the Bureau itself, made no effort to reconcile the Bureau's partial count with the applicable statutory and constitutional language. Nor could it have done so. There simply is no plausible understanding of the word "population" or the phrase "whole number of persons in each State" that would limit those terms to persons employed by the federal government.

2. Similarly doubtful is the district court's attempt to justify the Bureau's preferential treatment of overseas federal employees on the basis that they are supposedly easier to identify and enumerate than most other Americans living overseas. See App. 18a (asserting that "federal overseas employees are uniquely susceptible to being accurately counted because the Census Bureau has access to data about those individuals which is different both in quality and quantity from the data available about other Americans overseas"). This purported distinction fails for at least three reasons.

First, it has no basis in the text of either the Census Clause or the Census Act. If the Bureau believes that federal overseas employees are part of the "population of the United States" for purposes of the Census Act, then so too are LDS missionaries and other Americans living abroad who retain the same kinds of ties to their home States. To be sure, some portions of this overseas "population" may be practically impossible to count, just as some portions of the domestic population defy enumeration. But the Bureau has never claimed that all Americans living abroad other than federal employees are impossible to count. It simply refuses to count *anyone* other than federal employees, even if other Americans abroad could be counted just as easily, and even if they retain the same kinds of ties to their home States.

Second, to the extent that overseas federal employees should be included in the decennial census because they are easy to identify and allocate to their respective States, so too should LDS missionaries. Indeed, undisputed evidence in this case shows that LDS missionaries maintain close ties to their home States, return to their home States immediately upon completing their service overseas, and can be allocated accurately to their respective home States by reference to existing records. ASUF ¶ 30, at 19, ¶¶ 54-56, at 25-26. In fact, the records that could be used to allocate LDS missionaries to their respective States are arguably more

reliable than those the Bureau uses to allocate overseas federal employees, inasmuch as the "home of record" information used to allocate the latter can be many years out of date. See ASUF ¶ 20, at 16.

Third, to the extent the district court's reasoning can be read to suggest that LDS missionaries should be excluded from the decennial census because they comprise a small segment of the total overseas population, or because their distribution among the States does not mirror that of the domestic resident population, the same objections apply with equal force to overseas federal employees. See Utah Reply at 42-44. While the latter certainly comprise a significant portion of all Americans residing abroad, they still represent a relatively small component of the total overseas population, which, as the district court noted, is estimated to consist of three to ten million persons. See App. 12a n.6. Also, although they may be distributed differently than LDS missionaries, overseas federal employees constitute an arbitrary, non-representative segment of the total overseas population, the distribution of which differs significantly from that of the domestic resident population. See ASUF ¶¶ 33-42, at 20-22.

It therefore follows that, if LDS missionaries must be excluded from the apportionment count, as the district court concluded, App. 12a-14a, and as the Bureau maintains, see DOJ Mem. at 28, so too must overseas federal employees. The Bureau's decision to enumerate only the latter defies any logical explanation, and therefore does not bear the requisite "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Wisconsin*, 517 U.S. at 20.

3. By the same token, the district court was wrong to conclude that overseas federal employees are somehow entitled to special treatment in the apportionment count because of the supposed "involuntariness of their overseas posting, at the behest of their government." App. 17a. Once

again, there is no textual basis for any such distinction. If overseas federal employees are part of the "population" that the Bureau must attempt to count pursuant to the Census Act, then so too are other Americans living abroad who retain similar or greater ties to their home States. The Bureau cannot avoid counting the latter simply because they may not be serving abroad "involuntarily, at the behest of their government."

Conversely, if non-federal employees living abroad are *not* part of the pertinent "population" that must be "enumerated," then neither are overseas federal employees. And neither the Census Act nor the Census Clause allows them to be counted merely because they are serving their country. Neither the Bureau nor the district court has ever come to grips with this fundamental textual problem.[9]

The district court's discussion of this point was based on an unduly expansive reading of *Franklin*, which apparently stemmed from a passing reference in the *Franklin* opinion to the circumstances that sometimes lead to an overseas assignment. See 505 U.S. at 793. But that reference was in no way crucial to the Court's holding, and cannot be read to bestow any special status or entitlement on overseas federal employees. Indeed, such a conclusion would seem to violate the most basic notions of equal protection.

To understand the troubling implications of the district court's assertion to the contrary, one need only consider whether the Bureau could lawfully choose to limit the enumeration of the domestic population to individuals employed by the federal government. While it could certainly be said that federal employees (both in the United States and

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[9] Perhaps the Bureau or the district court was attempting to define overseas federal employees as a single relevant "population" under the Census Act, 13 U.S.C. § 141(a). But this approach fares no better, inasmuch as the statutorily relevant "population" is the "population *of the United States*" and of each individual State. *Id.* (emphasis added).

overseas) (a) perform valuable service to their country, (b) are sometimes assigned to work in places where they would not otherwise choose to live, and (c) can in many instances be identified more easily than other members of the population, it defies reason to suggest that the Bureau could fulfill its statutory and constitutional duties to conduct an "actual Enumeration" of the domestic "population" by limiting the census of that population to persons employed by the federal government. The district court's conclusion is equally implausible in the context of the overseas population.

4. Finally, the district court was wrong to suggest that Utah's claims are affirmatively precluded by this Court's opinion in *Franklin*. See App. 17a-18a. As indicated above, *Franklin* did not address the question at issue here: whether the Bureau's partial enumeration of the overseas population – and its simultaneous exclusion of all other segments of that population – can be reconciled with the Census Clause. *Franklin* merely rejected one narrow constitutional objection to the enumeration of overseas federal employees—the argument that the Apportionment Clause requires "physical presence in the United States." 505 U.S. at 804. Contrary to the district court's analysis, this narrow holding cannot be read broadly to immunize the Bureau's current practice of counting federal employees residing outside the United States, but excluding other groups of overseas Americans.

In fact, *Franklin* strongly supports Utah's claims. In *Franklin*, this Court explained that it is appropriate to add to the apportionment count Americans residing temporarily overseas who "consider themselves to be usual residents of the United States." *Id.* at 806. The Court also noted that counting such persons "does not hamper the underlying constitutional goal of equal representation" and in fact "promotes equality." *Id.* Finally, the Court even indicated that a decision to exclude such persons from the census could implicate the Census Clause by preventing "the votes of all those who reside in [a particular] State" from being "weighted

equally to votes of those who reside in other States." *Id.* If anything, then, *Franklin* itself undermines the Bureau's refusal to enumerate individuals residing temporarily overseas who, like LDS missionaries, maintain close ties with their home States and can be enumerated and allocated to their respective States by reference to existing records.

The district court, moreover, made no attempt to answer any of the most vexing questions raised by its own incomplete analysis of these issues. For example, the district court provided no analysis about the *degree* to which the enumeration of one component of the overseas population may inure to the benefit or detriment of "one state, or a group of states," App. 18a, without implicating the Census Clause or the Census Act. Similarly, the court stopped short of explaining why overseas federal employees are such a "unique subset of Americans abroad," *id.* at 17a, that the Bureau can make significant efforts to include them in the decennial census, while making no attempt to enumerate other identifiable components of the overseas population. In short, the district court failed to provide the kind of guidance called for in cases that, like this one, will have broad, precedent-setting impact on future censuses.

Appellants do not fault the district court for failing to provide such guidance, for that is the role this Court traditionally has played. But especially in light of the Bureau's policy and the district court's opinion, such guidance is sorely needed now. For that reason, and for all of the other reasons discussed above, the questions presented are sufficiently substantial to require this Court's plenary consideration of this case.

II. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS REGARDING THE PROPER INTERPRETATION OF THE "SUBSTANTIAL BURDEN ON RELIGION" INQUIRY UNDER THE RELIGIOUS FREEDOM RESTORATION ACT AND THE FREE EXERCISE CLAUSE.

The district court's analysis of the missionary plaintiffs' religious liberty claims also raises a substantial federal question worthy of this Court's review. Indeed, the district court's approach to determining whether the Bureau's discriminatory policy poses a "substantial burden on religion" would make it virtually impossible for anyone to invoke either the Religious Freedom Restoration Act or the First Amendment's Free Exercise Clause.

In addressing the religious liberty claims in this case, the panel acknowledged that "missionary work is one of the most basic and important obligations of the LDS faith." App. 10a (internal quotation marks omitted); see also ASUF ¶¶ 54-60, at 25-26 (summarizing evidence establishing the importance of missionary work in the LDS belief system, and describing the extent to which LDS missionaries are similarly situated to overseas federal employees). Without disputing that, as a direct result of their decision to act in conformity with their religious beliefs, LDS missionaries serving overseas were excluded from the 2000 census, the panel concluded that the plaintiffs had failed to establish that the Bureau's actions imposed any burden on the free exercise of religion. See App. 10a-11a. Specifically, the panel noted the absence of any evidence showing that any of the missionary plaintiffs "was even aware of the upcoming census when [they] decided to serve" missions, or that any of them knew that the Bureau's "failure to enumerate [missionaries residing overseas] would have any effect at all on the apportionment of House of Representative seats to Utah." *Id.* at 10a.

In essence then, the district court concluded that the Bureau's discriminatory enumeration policy imposes no

substantial burden on religious exercise because there is no evidence that the policy actually prevented any of the missionary plaintiffs from serving missions, or caused them to consider abandoning their plans to serve. In this respect, the district court's opinion completely misconstrues the substantial burden inquiry.

It is well settled, both under RFRA and under the Free Exercise Clause, that government action imposes a substantial burden on religion whenever it has a "*tendency* to coerce individuals into acting contrary to their religious beliefs." *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (emphasis added) (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988)). As this Court noted in *Hobbie* v. *Unemployment Appeals Commission*, 480 U.S. 136 (1987), "[w]here the state . . . denies . . . a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 141 (emphasis in original omitted).[10]

Just such a burden is presented here: the Bureau's discriminatory policy clearly "denies a benefit" (an additional congressional seat) "because of conduct mandated by religious belief" (missionary service). Thus, although the

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[10] Recent amendments to RFRA make clear that a substantial burden can exist even when the practice at issue is not "mandated" by or "central" to the person's religious beliefs. As amended, RFRA now defines the term "religious exercise" to include any "exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(b) (emphasis added). This definition, found in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), Pub. L. 106-274, 42 U.S.C. § 2000cc-1 *et seq.* (signed into law Sept. 22, 2000), is explicitly incorporated into RFRA through 42 U.S.C. § 2000bb-2, which states that "the term 'exercise of religion' [under RFRA] means religious exercise, as defined in section 2000cc-5 of this title."

burden on religion "may be indirect," it "is nonetheless substantial."

Accordingly, the fact that the LDS missionary plaintiffs here were not (and could not have been) aware that their discriminatory exclusion from the census would make a distributive difference in the apportionment count is irrelevant. The courts have made clear that it is the character of the government action – and its tendency to compel *others* to act contrary to religious belief – that burdens religion. See *Mockaitis* v. *Harclerod*, 104 F.3d 1522, 1533 (9th Cir. 1997) (holding that the government substantially burdened religion by secretly tape recording a prisoner's confession to a Roman Catholic priest); see also generally *Everson* v. *Board of Educ.*, 330 U.S. 1, 16 (1947) (the government "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.").

Discriminatory actions like those of the Bureau therefore violate RFRA whether they are known (and thereby compel a choice) or unknown (and thereby inflict a substantial burden in secret). Any other rule would reward the government for concealing the practical effect of religious discrimination until the opportunity to avoid its consequences had passed. And any other rule would, ironically, provide protection from such discrimination only to those whose religious convictions are lukewarm.

This analysis confirms that RFRA's "substantial burden" requirement bears little resemblance to the unreasonably stringent standard articulated by the district court. A plaintiff need not show that a government policy will force or has forced individuals to act contrary to their religious beliefs. Rather, a substantial burden can be established for purposes of RFRA upon a showing that a government policy makes religious observance more difficult in a manner that *tends* to coerce individuals to disregard their religious duty.

Obviously, the fact that something has a particular tendency does not mean that this tendency will necessarily be strong enough to produce a certain result. See, *e.g.*, *Black's Law Dictionary* 1467 (6th ed. 1990) (defining "tend" as to "serve, contribute or conduce in some degree or way"); *Webster's New Universal Unabridged Dictionary* 1879 (2d ed. 1979) (defining tendency as an "inclining or contributing influence"). In fact, in a number of cases plaintiffs have refused to act contrary to their religious beliefs to secure a governmental benefit, yet this Court has concluded that the choice the government imposed on these believers constituted a substantial burden on religion. See *Hobbie*, 480 U.S. at 140-41 (Sabbatarian refused to work on Saturdays despite the State's insistence that such failure would disqualify her from participation in the State welfare program); *Sherbert* v. *Verner*, 374 U.S. 398, 403-04 (1963) (same); *Thomas* v. *Review Bd. of Employment Sec. Div.*, 450 U.S. 707, 715-18 (1981) (Jehovah's Witness refused to produce armaments despite resulting denial of welfare benefits).[11]

Under the district court's decision, by contrast, federal agencies will be free to take any action that has a tendency to discourage religious exercise as long as there is no plaintiff

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[11] Indeed, RFRA was enacted to restore the broad protections for religious liberty that existed as a matter of constitutional law before this Court's decision in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990). RFRA expressly reinvigorates (as a matter of federal statutory rather than constitutional law) the pre-*Smith* free-exercise case law, including *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). *See, e.g.*, 42 U.S.C. § 2000bb(b); *City of Boerne* v. *Flores*, 521 U.S. 507, 515 (1997); *Werner* v. *McCotter*, 49 F.3d 1476, 1479 (10th Cir. 1995). Accordingly, the pre-*Smith* and post-*Smith* free exercise case law is instructive in its explanation as to what constitutes a substantial burden for purposes of RFRA. RFRA's standard is at least as favorable to religion as the post-*Smith* constitutional cases and, to the extent that the pre-*Smith* cases are more favorable to religion, RFRA explicitly adopts their standard. The district court's ruling is erroneous because it fails to reflect that fact.

who can show that the discouragement was so strong, and his commitment to his religious belief so weak, that the agency's action made him fail to live up to that belief.[12] That approach would eviscerate the protections for religious freedom enshrined in both the Constitution and RFRA. Accordingly, this aspect of the district court's decision raises a substantial question that merits this Court's review.

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[12] The speciousness of the district court's analysis is further illustrated by a hypothetical. Assume that Congress enacts legislation imposing a federal voter registration procedure under which voters can register only during personal visits by government registrars to voters' homes. The agency charged with administering the law directs the registrars to conduct the visits only on Saturday mornings, but creates an exception for federal government workers, allowing them to register at their workplace during normal business hours. Undoubtedly, such a policy would impose a substantial burden on the religious liberties of people who, for religious reasons, are occupied with religious services on Saturday mornings. Nevertheless, under the district court's analysis, such people would be unable to obtain relief unless they could show that the policy would lead them to forgo their weekly worship services. Such a result is patently at odds with this Court's religious liberty jurisprudence, and with common sense.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted,

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